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Before the
Federal Communications Commission
Washington, D.C. 20554

15 1996

In the Matter of	)	
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Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)))))	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	))	GN Docket No. 90-314

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COMMENTS OF ROSEVILLE TELEPHONE COMPANY

ROSEVILLE TELEPHONE COMPANY

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SUMMARY

Roseville Telephone Company ("RTC") commends the Commission for its emphasis throughout the Notice of Proposed Rulemaking in this proceeding that rule revisions must promote expeditious delivery of PCS to the public. In crafting revisions to the D, E and especially the F Block rules, the Commission must be mindful to foresee and avoid litigation and resulting administrative delays. Any substantial delay in the F Block auction will seriously impair the competitive prospects of entrepreneurs looking to enter the wireless telecommunications market.

RTC recommends that the eligibility limit for participation in the F Block auction be capped at $125 million in annual operating revenues and lowered to $300 million in total assets. While it will require substantial assets to bid for, construct and operate F Block systems, such expenses will not be equivalent to those for the C Block. The revised asset eligibility limit will ensure that applicants have sufficient resources to succeed, while promoting competitive opportunities for applicants who may have been shut out of the bidding in the C Block auction. In calculating an applicant's assets for the purposes of F Block auction eligibility, the value of an applicant's C Block (as well as A and B Block) licenses <u>should</u> be included. Such an analysis is required under the definition of "total assets" currently used in calculating entrepreneurs block eligibility, and the few C Block licensees so excluded can still bid for spectrum in the D and E Blocks.

In looking at affiliation rules, Section 24.720(l)(11)(ii) should be expanded to apply to the F Block, as it succeeded in increasing participation in the C Block auction by small businesses.

The definition of rural telephone company for the purposes of the PCS rules should be expanded to local exchange carriers with up to 120,000 access lines. When the Commission previously expanded its definition of rural telco from LECs with 50,000 access lines to LECs with 100,000 access lines, it was attempting to target specific LECs who are likely to build broadband PCS infrastructures to serve rural areas. However, by the time that the F Block auction occurs, at least two years will have passed since the revision to the definition of rural telco, and some of the targeted LECs will have grown past 100,000 access lines. Nevertheless, the intentions of the targeted companies is unlikely to have changed as a result of this minor growth, and the definition must be updated accordingly. Nothing in the Telecommunications Act of 1996 or its legislative history suggests that Congress intended the general definition of rural telco in Section 3(a) to apply to the PCS bidding rules.

There is no evidence that the PCS/cellular cross-ownership rule prevents anti-competitive behavior, at least any more than that prevented by the commercial mobile radio service ("CMRS") spectrum cap. Indeed, in light of this fact, and the regulatory complexities created by three different related spectrum caps, RTC recommends that the Commission eliminate the PCS/cellular cross-ownership rule, and revise the CMRS spectrum cap to prohibit attributable interests in more than 40 MHZ of non-SMRS spectrum in any overlapping geographic areas. It is essential that the Commission calculate attribution for the purposes of such caps in a rational manner. The Commission should thus look to a formula that relates to the underlying concern of the rule: attribution should be based on actual control of an applicant or licensee, with a presumption that minority non-controlling interests are not attributable.

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COMMENTS OF ROSEVILLE TELEPHONE COMPANY

Roseville Telephone Company ("RTC"), by its attorneys, hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking, released March 20, 1996 (the "*Notice*") in the above-captioned proceeding. RTC is an independent local exchange carrier serving subscribers in Northern California, with just over 100,000 access lines. Through a subsidiary, and with other partners, RTC participated in the Commission's C Block auction of Personal Communications Services ("PCS") licenses. RTC is very familiar with the "entrepreneurs block" bidding rules, and welcomes the opportunity to suggest minor revisions to those rules, as discussed below.

RTC commends the Commission for its emphasis throughout the *Notice* that rule revisions must promote expeditious delivery of PCS to the public. RTC has been preparing for the PCS spectrum auctions since 1994, and like many parties, has grown increasingly frustrated as litigation and resultant administrative actions substantially delayed the commencement of the C Block auction In crafting revisions to the D, E and especially the F Block rules, the Commission must be mindful to avoid similar delays. Any substantial delay in the F Block auction will seriously impair the competitive prospects of entrepreneurs looking to enter the wireless telecommunications market

With two incumbent cellular providers in each market, construction and commencement of service by A and B Block PCS licensees, and the impending completion of the C Block auction, winners of the F Block licenses could be the sixth wireless service provider in many markets While this might reduce the cost of F Block licenses, the rapid increase in wireless operators is creating a shortage of skilled labor and facilities, with reduced availability of antenna sites and rights of way. Financing and other necessities to commence operations may be impacted in a similar manner. Delays in auctions thus result not only in delayed construction due to increased costs, but in subsequent delays in market entrance. Potential F Block entrepreneurs may be left to watch as existing operators increase their market share to a level that threatens the viability of new entrants Accordingly. whatever revisions the Commission makes to its PCS bidding rules, it must do so in a manner that minimizes judicial and administrative delay to the remaining auctions. as mandated by Congress.[1]

I. F Block Eligibility Limits and Inclusion of C Block Licenses as Assets

Under the Commission's current rules, in order to be eligible to participate in the F Block "entrepreneurs block" auction, an applicant (together with its affiliates and

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1 *See* 47 U.S.C § 309(j)(2)(B).

attributable principals) must have gross revenues of less than $125 million in each of the preceding two years, and total assets of less than $500 million. The Commission seeks comments (*Notice* at para. 33) as to whether there is any need to make adjustments to these eligibility thresholds. RTC believes that it would maximize the goal established in Section 309(j)(2)(B) of the Communications Act ("...avoiding excessive concentration of licenses and ... disseminating licenses among a wide variety of applicants ...") if the eligibility limits were capped at $125 million in annual operating revenues and lowered to $300 million in total assets. While it will require substantial assets to bid for, construct and operate F Block systems, such expenses will not be equivalent to those for the C Block. The revised asset eligibility limit will ensure that applicants have sufficient resources to succeed, while promoting competitive opportunities for applicants who may have been shut out of the bidding in the C Block auction.

In calculating an applicant's assets for the purposes of F Block auction eligibility, the value of an applicant's C Block (as well as A and B Block) licenses <u>should</u> be included.[2] Such an analysis is required under the definition of "total assets" currently used in calculating entrepreneurs block eligibility. *See* Section 24.720(g) of the Commission's rules (" ... the book value [except where generally accepted accounting principles ... require market valuation] of <u>all</u> property owned by an entity, whether real or personal, tangible or intangible ...")(emphasis added). Furthermore, possession of PCS licenses is obviously one of the most important, if not <u>the</u> most important asset to a

[2] The value of a license is (and for this purpose should be) the final price bid, minus any bidding credits.

potential PCS operator, and any analysis of a PCS applicant's "assets" without including its PCS licenses would be senseless. While a few C Block winners could be excluded from bidding on F Block licenses, this does not mean that they would be barred from obtaining an additional 10 MHz of PCS spectrum Rather, such applicants could bid in the D and E Block auctions.[3]

II. Affiliation Rules

In its *Competitive Bidding Sixth Report and Order*,[4] the Commission modified its affiliation rules to allow C Block small business applicants to exclude (in calculating eligibility) any affiliates who would otherwise qualify as entrepreneurs by having revenues under $125 million and total assets under $500 million and whose total assets and gross revenues, when considered on a cumulative basis and aggregated, do not exceed these amounts. The *Notice* (at para 38) seeks comments as to whether this C Block affiliation rule [Section 24.720(l)(11)(ii)] should be expanded to the F Block auctions. RTC asserts that such a modification would serve the public interest.

Section 24.720(l)(11)(ii) succeeded in increasing participation in the C Block auction by small businesses For example, use of that rule section allowed an individual

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[3] Section 24.715(a) provides that F Block licensees must maintain their eligibility (*i.e.*, remain under the revenue and asset limits) for at least five years. However, in recognizing that such companies can and should grow, Section 24.715(a)(3) provides that increases in revenues or assets resulting from "revenue from operations, business development or expanded service shall not be considered [towards their continued eligibility]." However, such a rule allowing entities to retain licenses previously purchased is distinguishable from a proposal, rejected herein by RTC, that C Block licenses not be included in the calculation of eligibility to bid on new licenses.

[4] 11 FCC Rcd 136 (1995).

and a small local exchange carrier (with less than 2,500 access lines) to pool resources with RTC, and had the combined applicant won C Block licenses, to draw on RTC's marketing and operational expertise. RTC believes that application of the rule to the F Block will be equally productive: while F Block licenses will likely cost less than C Block licenses, the costs of winning bids, construction and initial operation will still be very substantial, and the need for new entrants to draw on the expertise of others will remain.

III. Definition of Rural Telephone Company

In paragraph 52 of the *Notice*, the Commission seeks comments on the impact of the Telecommunications Act of 1996[5] on the definition of rural telephone company ("rural telco") as used in PCS rules, and asks whether the definition should be revised, on that basis or any other. RTC believes that Congress intended the definition in Section 3 of the 1996 Act to apply only to new Sections of the Communications Act, such as Section 251, and not to existing Sections, such as Section 309(j). However, for independent policy reasons, the definition of rural telco for the PCS rules should be expanded to include local exchange carriers ("LECs") with up to 120,000 access lines.

In the *Competitive Bidding Fifth Report and Order*, the Commission expanded its definition of rural telco from LECs with 50,000 access lines to LECs with 100,000 access lines, including all affiliates. 9 FCC Rcd 5532, 5617 (1994). In so doing, the Commission was attempting to target specific LECs who are likely to build broadband

5 Pub. L. No. 104-104, 110 Stat. 56 (1996)(hereinafter, "1996 Act").

PCS infrastructures to serve rural areas. 9 FCC Rcd at 5617.[6] However, by the time that the F Block auction occurs, at least two years will have passed since the revision to the definition of rural telco. and some of the targeted LECs will have grown past 100,000 access lines.[7] However, the intentions of the targeted companies is unlikely to have changed as a result of this minor growth. Furthermore, as the Commission noted in paragraphs 2 through 7 of its *Competitive Bidding Second Report and Order*,[8] in crafting competitive bidding rules that promote the objectives set forth in Section 309(j)(3) of the Communications Act, such rules must promote economic growth, provision of advanced telecommunications services to rural subscribers, and enhanced participation in the provision of such services by rural telcos. In looking at the appropriate current definition of rural telco, the Commission should recognize that recent growth over 100,000 access lines is a measure of the economic growth of the area served by the LEC It would be counter-productive if the rules for licensing a technology designed to promote economic growth in fact punish the results of that growth, and undercut the ability to use PCS to further such growth. Indeed, based on such reasoning, the Commission's staff has noted that a PCS licensee does not jeopardize its rural telco status by growing over 100,000 access lines after grant of the

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[6] Approximately 12 LECs, at most, were added into the definition of rural telco by expanding the limit from 50,000 to 100,000 access lines. *See* United States Telephone Association's 1995 Phone Facts at pages 10-11, listing 12 LECs with 47,000 to 95,000 access lines, as of December 31 1994

[7] For example, in the interim, RTC has grown from approximately 92,000 access lines to the current 102,000 access lines

[8] 9 FCC Rcd 2348 (1994).

PCS license. *See,* "*Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction,*" 78 RR 2d 727 (1995).

The Commission's discretion to alter the definition of rural telco for the purposes of the PCS rules is not limited by the definition in Section 3(a) of the 1996 Act. Nothing in that Act or its legislative history suggests that Congress intended the general definition in Section 3(a) to apply to the PCS bidding rules.[9] However, numerous references are made to the term rural telephone company in various new sections of the Communications Act created by the 1996 Act such as exemption from the interconnection requirements of new Section 251 Such references were the intended subject of the definition in Section 3(a) of the 1996 Act.[10]

Accordingly, the definition of rural telco should be expanded to include LECs with less than 120,000 access lines, including all affiliates. This minor revision only updates the targeting (in the *Competitive Bidding Fifth R&O*) of a limited number of LECs, and will have an important impact on the provision of PCS to rural subscribers.

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[9] Indeed, the most direct reference to such issues in the 1996 Act, and one of the only references therein to Section 309(j) of the Communications Act, is Section 707's requirement that the Commission use interest earned on deposits from <u>all</u> auctions to create a Telecommunications Development Fund, designed to assist provision of telecommunications services to underserved rural areas. It would promote the objective of Section 707 to increase, rather than decrease, the number of LECs that qualify as rural telcos.

[10] While RTC does not believe that Congress intended the 1996 Act to impact the PCS rules, if the Commission concludes otherwise, then it should recognize that newly enacted Section 251(f)(2) ("Suspensions and Modifications for Rural Carriers") creates a *de facto* definition (in addition to that in Section 3(a)) of rural telco: a LEC "with fewer than 2 percent of the Nation's subscriber lines ...." Accordingly, LECs that serve less than 2 percent of the Nation's subscriber lines should qualify as rural telcos for the purposes of the Commission's PCS rules

IV. PCS/Cellular Cross-Ownership Rule, Attribution, and the CMRS Spectrum Cap

Under Section 24.204(a) of the Commission's rules, no party with an attributable interest in a cellular license may be granted a license for more than 10 MHz of broadband PCS spectrum prior to the year 2000 if the geographic area of the PCS license significantly overlaps that of the cellular license. In *Cincinnati Bell Telephone Co. v. FCC*,[11] the Sixth Circuit held that the cross-ownership rule is unsupported by the record, and that even if the FCC could create a record supporting PCS/Cellular cross-ownership rules, the existing attribution rule (20 percent equity, regardless of whether the attributed party has actual control of the cellular licensee) is irrational and unsupported by the record. The *Notice* seeks comments as to whether the cross-ownership rule, and the attribution rule, should be relaxed or retained.

RTC believes that there is no evidence that the PCS/cellular cross-ownership rule prevents anti-competitive behavior, at least any more than that prevented by the commercial mobile radio service ("CMRS") spectrum cap (Section 20.6(a) of the Commission's rules). Indeed, in light of this fact, and the regulatory complexities created by <u>three</u> different caps (cellular operators are limited to 35 MHz of PCS/cellular spectrum under Section 24.204, PCS operators are limited to 40 MHz of PCS spectrum in any particular area under Section 24.229(c), and Section 20.6(a) creates an overall 45 MHz CMRS spectrum cap), RTC recommends that the Commission eliminate the PCS/cellular cross-ownership rule, and revise the CMRS spectrum cap to prohibit attributable interests in more than <u>40</u> MHz of <u>non-SMRS</u> spectrum in any overlapping

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[11] 69 F.3d 752 (6th Cir. 1995).

geographic areas.

The above proposal would rationally simplify the regulatory regime and still ensure substantial competition in the provision of CMRS. Under the 40 MHz cap, any particular market would have the two existing cellular operators, each with no more than 15 MHz of PCS spectrum. In addition, there would be at least three other PCS operators,[12] as well as low earth orbit satellite operators, resellers of PCS and cellular service, etc. With a minimum of five competitors, at least four of which could have equal amounts of essentially identical spectrum,[13] there is no way for one operator to tie up spectrum to create market power.

Regardless of the resolution of multiple caps, it is essential that the Commission calculate attribution for the purposes of such caps in a rational manner. As the Sixth Circuit stated in *Cincinnati Bell*, the 20 percent equity "bright line" bears no rational relationship to control of an entity, and thus bears no rational relationship to the underlying purpose of the rule: preventing anti-competitive behavior. Accordingly, no record can be built to support the 20 percent equity formula, and the Commission should thus look to a formula that relates to the underlying concern of the rule: attribution should be based on <u>actual control</u> of an applicant or licensee.[14]

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[12] In the example herein, 30 MHz of PCS spectrum is held by the two cellular operators, leaving 90 more MHz of PCS spectrum. Even if two operators each held 40 MHz of PCS spectrum, 10 MHz would remain for a third PCS operator.

[13] Two cellular/PCS operators, and two other PCS operators. *See* note 13 *supra*.

[14] If the Commission nevertheless insists on using a "bright-line" equity formula, then a 40 percent equity holding should be the minimum required to trigger attribution. Any lower standard would be inconsistent with the attribution standard

The Commission has a long and successful history in other services (*e.g.*, broadcasting) of analyzing whether one entity has actual control of another, and the requirement to perform such an analysis on a case-by-case basis in PCS should not be any more burdensome. While actual control can result from many different means, at least two equity structures should create presumptive answers in this analysis: single majority ownership, and limited partnerships. If a single person or entity holds a majority voting interest in another entity (*i.e.*, 50.1% or greater), the remaining equity holders lack even negative control over the entity. In such a case, the minority equity holders should not be held to have an attributable interest in the entity. *See* 47 C.F.R. § 73.3555, note 2(b) (calculation of "cognizable interest" for purpose of broadcast multiple ownership rules).

The existence of a limited partnership structure provides a similarly clear result. Under the Uniform Limited Partnership Act and the Revised Uniform Limited Partnership Act (which form the basis for all state statutes except for Louisiana), the role of the limited partner is very circumscribed, and analogous to that of an investor. Limited partners may not participate in the management or control of the partnership's business, since doing so would negate their limited liability status.[15] Again, for the purposes of analyzing attribution in the broadcast context, the Commission has concluded that limited partners typically do not influence, much less control, the management and

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applied to many participants in the C Block auction, and presumably, to many C Block licensees. The result would be that C Block licensees would be automatically excluded from obtaining further PCS spectrum.

[15] *See, e.g.*, Angela Schneeman, *The Law of Corporations, Partnerships and Sole Proprietorships* (Lawyers Cooperative, 1993), at 71.

operation of a licensee. *Attribution of Ownership Interests*, 97 FCC 2d 997, 1022-23 (1984); *recon.*, 58 RR 2d 604 (1985); *further recon.*, 1 FCC Rcd 802, 804 (1986).[16] The same conclusion should be applied in the context of this proceeding.

In sum, attribution for the purposes of PCS/cellular cross-ownership and/or a CMRS spectrum cap should be based on actual control in each particular case, but there should be a presumption that limited partnership holdings, and minority equity holdings where there is a single majority owner, do not constitute attributable interests.[17]

V. Conclusion

In crafting revisions to the PCS rules, the Commission must be mindful of the need to prevent further litigation and administrative delay. Nevertheless, certain rule

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[16] In that proceeding, the Commission required that limited partners relieved from attribution are to be barred from "any material involvement" in the licensee. 97 FCC 2d at 1023. In order to promote verification of that requirement, the Commission required limited partners claiming relief from attribution to certify that they have no material involvement in the management or operations of the entity at issue. The Commission could enact a similar requirement in this proceeding.

[17] Such an approach is consistent with Sections 24.204(d)(1) and 24.204(d)(2)(viii)(B)(*1*) of the Commission's rules

revisions, as set forth above, are necessary and appropriate, and enacting such revisions should not create undue delay.

Respectfully submitted,

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